In the Supreme Court of the United States.

OCTOBER TERM, 1899.

W. B. AUSTIN

vs.

STATE OF TENNESSEE.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

I.

STATEMENT OF CASE.

Austin prosecutes writ of error to reverse the judgment of the Supreme Court of Tennessee affirming the judgment of the Criminal Court convicting him and imposing a fine of $50.00 for selling cigarettes, in violation of the statute, passed in 1897, by the Legislature of said State, prohibiting the introduction and sale of cigarettes.

The statute is in these words, to-wit:

"Be it enacted by the General Assembly of the State of Tennesse: That it shall be a misdemeanor for any person, firm, or corporation, to sell, offer to sell, or to bring into the State for the purpose of selling, giving away, or otherwise disposing of any cigarettes, cigarette paper, or substitute for the same; and a violation of any of the

provisions of this Act shall be a misdemeanor, punishable by a fine of not less than fifty dollars.

"Be it further enacted, That the grand juries shall have inquisitorial power over offences committed under this Act."

Session Acts, 1897, Ch. 30.

The able and exhaustive opinion of the State Court, copied into the record, renders unnecessary any extended discussion of the questions involved.

The decision of the State Court is based upon two propositions, either of which will support its judgment. These propositions are:

1. That cigarettes, not being, on account of their noxious and hurtful character, *per se* legitimate articles of commerce, and not having been declared such, and commerce therein regulated, by Congress, it was the right and duty of the State, under its reserved police powers, to pass the statute in question, for the protection of the lives and health of its people, until Congress shall take appropriate action in the matter.

There is not implied in the State Court's decision any denial of the paramount power of Congress over the subject, when Congress shall choose to act.

2. That the sale of cigarettes involved in this case was not of an original package, but of parts of an original package that had been broken by the importer, and, therefore, not protected by the commercial clause of the Federal Constitution.

II.

ARGUMENT.

First: Cigarettes are not legitimate articles of commerce, and therefore their introduction into the State may be prohibited under the State's police power.

In the discussion of the first proposition it is important to note the precise terms and scope of the statute under consideration. It has been assumed that it is an absolute prohibition, and, therefore, a total obstruction of all interstate commerce in cigarettes within the State of Tennessee. Such is not the fact.

It does, unquestionably, prohibit the sale, the offering for sale, and the bringing into the State of cigarettes for sale, giving away, or other disposition for use. To remedy the evil at which the statute was levelled, it could not have done less. It does not, however, go beyond the "necessity" of the case. It does not prohibit, or embarrass, the transportation of cigarettes through or across the State, nor their introduction and even deposit in the State for re-shipment, or for any purpose other than use and consumption in the State.

This statute is enacted under the conceded power of the State to protect the lives, health and morals of its citizens, and has a "real and substantial relation to those objects." It does not obstruct or embarrass interstate commerce in cigarettes "beyond the necessity" of the case.

It is not a "palpable" and "needless" invasion of federal jurisdiction, such as this Court condemns,

although the statute may be enacted under color or pretense of exercise of police power.

Railroad vs. Husen, 95 U. S., 465.
Railroad vs. Ohio, 173 U. S., 300.

This statute makes no discrimination between citizens of Tennessee and citizens of other States. It is absolutely impartial.

It is not a statute that gives to Tennessee commercial advantages over other States. On the contrary, it involves a sacrifice of commerce on the part of Tennessee to secure protection for the lives, health and morals of its citizens. Such is the true character of this statute.

The State Court thus characterizes the evil at which this statute was leveled:

"Are cigarettes legitimate articles of commerce? We think they are not because wholly noxious and deleterious to health. Their use is always harmful; never beneficial. They possess no virtue, but are inherently bad, and bad only. They find no true commendation for merit or usefulness in any sphere. On the contrary, they are widely condemned as pernicious altogether. Beyond question, their every tendency is toward impairment of physical health and mental vigor."

Tennessee is not alone in its unqualified condemnation of cigarettes. Other States have passed prohibitory statutes.

In *Sawrie vs. Tennessee, 82 Fed. Rep., 615*, Circuit Judge Lurton characterizes the use of cigarettes as "an evil of most pronounced character."

Recent examinations of candidates for military service disclosed the frightful extent to which the young men, eligible to army and navy, had been deteriorated and disabled by the use of

cigarettes. Can a State, in the absence of federal regulation of the subject, lawfully enact a statute, such as the one above quoted, to protect the lives, health and morals of its citizens against evil consequences of such "pronounced character" as it is declared the sale and use of cigarettes entail? "This Court has often declared that the most important function of government was to preserve the public health, morals and safety; that it could not divest itself to that power, nor by contract limit its exercise; and that even the constitutional prohibition upon laws impairing the obligation of contracts does not restrict the power of the State to protect the health, the morals or the safety of the community, as the one or the other may be involved in the execution of such contracts."

Bowman vs. Railroad, 125 U. S., 465. (31. L. Ed., 718.)
Stone vs. Miss., 101 U. S., 814.
Butchers' Union Co. vs. Crescent City Co., 111 U. S., 746.
N. O. Gas Co. vs. La. Light Co., 115 U. S., 650.
Mugler vs. Kansas, 123 U. S., 664.

Again, it is said that: "It is not only the right but the bounden and solemn duty of a State to advance the safety, happiness and prosperity of its people, and to provide for its general welfare by any and every act of legislation which it may deem to be conducive to these ends, where the power over the particular or the manner of its exercise is not surrendered or restrained by the Constitution of the United States."

New York vs. Miln, 11 Pet., 139.

"In giving the commercial power to Congress the States did not part with that power of self preservation which must be inherent in every organized community. They may guard against the

introduction of anything which may corrupt the morals or endanger the health or lives of their citizens."

Passenger Cases, 7 Hum., 400.

"This Court has never hesitated, by the most rigid rules of construction, to guard the commercial power of Congress against encroachments in the form or under the guise of State regulations established for the purpose and with the effect of destroying or impairing rights secured by the Constitution. *It has nevertheless, with marked distinctness and uniformity, recognized the necessity growing out of the fundamental conditions of civil society, of upholding State police regulations which were enacted in good faith, and had appropriate and direct connection with that protection to life, health and property which each State owes to her citizens.*"

Patterson vs. Kentucky, 97 U. S., 505.

"The true interest of the people of this country requires that both the National and State governments should be allowed, without jealous interference on either side, to exercise all the powers which respectively belong to them according to a fair and practical construction of the Constitution.

State rights and the rights of the United States should be equally respected. Both are essential to the preservation of our liberties and the perpetuity of our institutions. But in endeavoring to vindicate one we should not allow our zeal to nullify or impair the other."

Mr. Justice Bradley in ex parte Siebold, 100 U. S., 393.

It was aptly said by Mr. Justice Harlan, in *Plumley vs. Mass., 155 U. S., 461*, that there is

not a suggestion or intimation in any of the cases that the commercial clause of the Federal Constitution "secured to any one the *privilege of commiting a wrong against society.*"

And by Mr. Justice Green, in *Passenger cases, 7 How, 457:* "This right of the States has its foundation in the sacred law of self defense which no power granted to Congress can restrain or annul."

This Court has frequently recognized, and its decisions evince the difficulty of ascertaining and declaring that line of demarkation between the legitimate police powers of the States and the power of Congress to regulate commerce, that will best promote and subserve the interests of society and good government. While some general principles of universal application have been enunciated, the practice has been to declare the rule applicable to each particular case as it arises, leaving the Court free to deal with new cases upon their own merits. It is well settled that a State statute, enacted in good faith for the protection of the lives, health and safety of the people, or even to promote public convenience, if reasonably adapted to that purpose, does not violate the commercial clause of the Federal Constitution, though it may to some extent affect interstate commerce, especially if it relates to a subject of commerce that Congress has not undertaken to regulate.

Railroad vs. Ohio, 173 U. S., 285.

In *Sherlock vs. Ailing*, 93 U. S., 99, 103, Mr. Justice Field thus states the doctrine: "In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health,

life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation in a great variety of ways may affect commerce and persons engaged in it, without constituting a regulation of it, within the meaning of the Constitution." Approved in

Kidd vs. Pearson, 128 U. S., 23.
Railroad vs. Alabama, 128 U. S., 101, and other cases.

Similar utterences may be found in numerous decisions of this Court.

The opinion of the State Court supports the proposition that cigarettes are not legitimate articles of commerce, with a convincing argument, which need not be repeated here.

It is conceded in the brief filed on behalf of the plaintiff in error, that the State may lawfully regulate, or perhaps *prohibit*, the introduction of certain articles, such as "high explosives, or malodorous guanos," and "putrid meats." For what reason may this be done? Clearly because the articles are not legitimate subjects of commerce. They are, indeed, subjects of commerce, but not legitimate subjects of commerce.

But it is said in behalf of the cigarette, that "it will not explode, it is not malodorous."

Is not the cigarette a far more serious menace to the lives, health and safety of our people than any "high explosive" or "malodorous guano?"

None of the cases deny the right to the State to exclude the introduction of impure or fraudulent articles, which are otherwise legitimate articles of commerce. This rule has been applied to oleomargerine, and perhaps some other legitimate articles of commerce. But cigarettes are declared "inherently bad, and bad only." They

admit of no beneficial use, and are universally deleterious to health and vigor.

Beneficial uses of ardent spirits, opium, arsenic, strychnine, and even of "high explosives," "malodous guanos," and "putrid meats," may be suggested. Who can suggest any beneficial use of cigarettes? Who can suggest any but a harmful use of them?

In the concurring opinion of Mr. Justice Field, in *Bowman vs. Railroad, supra*, it is said:

"There may be great difficulty in regulating the use and sale of intoxicating liquors, and I admit that whenever the use of an article cannot be regulated and controlled so as to insure the health and safety of society, it may be prohibited, and the article destroyed."

If, as is admitted in the decisions of this Court, "the police power of a State justifies the adoption of precautionary measures against social evils," and if, "under it a State may legislate to prevent the spread of crime, or pauperism, or disturbance of the peace," and if a State may "exclude from its limits convicts, paupers, idiots, and lunatics, and persons likely to become a public charge, as well as persons afflicted by contagious or infectious diseases," why should a State be denied the right to exclude from its borders cigarettes, or other product or commodity whose use by its people tends to produce paupers, lunatics, convicts, and persons likely to become a public charge?

Does the freedom of commerce demand that citizens of other States and foreign countries shall have the right to invade any State of this Union, and there do what is denied to the citizens of that State by its laws, to wit: sell for consumption an article calculated to harm its people?

The reason and principle that excludes any of the articles mentioned apply to exclude cigarettes *in toto.* They are all "bad, and bad only."

This Court entertains a very strong, if not conclusive, presumption in favor of the validity of a State statute, enacted in good faith, to protect the lives, health and safety of its citizens, and reasonably appropriate for that purpose.

Powell vs. Pa., 127 U. S., 678.
Mugler vs. Kansas, 123 U. S., 664.

As illustrative of the proposition that State statutes of this character are valid though they may affect interstate commerce, the following cases are instructive:

State statutes that stop absolutely the flow of interstate commerce fifty-two days (Sundays) in the year have been held valid.

Hennington vs. Ga., 163 U. S., 299. S. C., 90 Ga., 396.
Railroad vs. Va., 34 L. R. A., 105.

These statutes are sustained upon the ground that the health and vigor of the people are promoted by rest for one day in each week.

State statutes requiring examinations and licenses of railroad employes, though engaged in conducting interstate commerce, have been sustained as reasonable police regulations for the safety of the traveling public.

Smith vs. Ala., 124 U. S., 464.
Railroad vs. Ala., 128 U. S., 96.

Likewise a State statute has been sustained which requires railway trains, though engaged in interstate transportation, to stop at all stations within the State.

Gladson vs. Minn., 166 U. S., 427, which distinguishes *Railroad vs. Illinois, 163 U. S., 142,*

on the ground that the latter case required stoppages at stations not on the direct line of travel. So a State statute forbidding the heating of trains in a particular manner, and applying to trains running interstate, was held valid, as a reasonable regulation for the safety and comfort of the public.

Railroad vs. New York, 165 U. S., 628.

So a State statute requiring railroads engaged in interstate and other commerce, to stop three trains each way daily, Sundays excepted, has been sustained as a reasonable regulation for the public *convenience.*

Railroad vs. Ohio, 173 U. S., 285.

Likewise State statutes requiring separate coaches, in interstate travel as well as local, for white and colored persons.

Smith vs. State, 100 Tenn., 494.
Plessy vs. Ferguson, 163 U. S., 537.

These cases will suffice, but there are numerous other decisions of this Court to the same effect. The principle upon which all these decisions is predicated is best expressed in the closing sentence of Mr. Justice Harlan's dissenting opinion in *Bowman vs. Railroad, 125 U. S., 524:*

"The reserved power of the States to guard the health, morals and safety of their people is more vital to the existence of society than their power in respect of trade and commerce, having no possible connection with these subjects."

The lives, health and safety of the people are weighter matters than any mere consideration of traffic. Both the Federal and State governments should co-operate to promote the best and highest interests of society. If the Federal government has acted, its action is controlling, but if it has

failed to do so, what just reason exists to deny the States the power to protect their citizens until Congress shall act?

Congress may at its pleasure annul the State regulation and substitute its own. "And since the doctrine we have deduced from the cases recognizes the right of Congress to interfere and control the matter whenever it may deem it necessary to do so, the exercise of this limited power may all the more safely be confided to the local legislatures."

Pound vs. Turck, 95 U. S., 459.
Railroad vs. Ohio, 173 U. S., 293.

To the suggestion that the States may abuse the power to pass statutes of this character by excluding ligitimate articles of commerce to build up their own interests, it is sufficient to say that possible abuse of power is never a just argument against its existence. But as the action of Congress supersedes any action of the States, and as this Court determines the good faith of all legislative enactments in cases of this character, it is difficult to appreciate the danger that is supposed to attend its exercise.

Speaking of "imaginary cases" put in argument, this Court in *Railroad vs. Ohio, 173 U. S., 308*, said:

"Without stopping to consider whether the illustrations referred to are apposite to the present inquiry, it is sufficient to say that it is always easy to suggest extreme cases for the application of any principle embodied in a judicial opinion. Our present judgment has reference only to the case before us, and when other cases arise, in which local statutes are alleged not to be legitimate exercise of the police power of the State, but to in-

fringe upon National authority, it can be determined whether they are to be controlled by the decision now rendered. It would be impracticable, as well as unwise, to attempt to lay down any rule that would govern every conceivable case that might be suggested by ingenious minds."

See also Bowman vs. Railroad, 125 U. S., 31 L. Ed., 718.

In *Bowman vs. Railroad, supra*, it is conceded that a more liberal rule in favor of the States exists in cases of interstate, than in cases of international commerce, the Court saying:

"The question, therefore, may be still considered in each case as it arises, whether the fact that Congress has failed in the particular instance to provide, by law, a regulation of commerce among the States, is conclusive of its intention that the subject shall be free from all positive regulation, or that, until it positively interferes, such commerce shall be freely dealt with by the respective States."

Revenue statutes are not, do not purport to be, and are not intended to be, regulations of commerce.

An implication from such legislation should not be permitted to affect, much less destroy, the police power of the State in matters vital to the public safety and health.

As shown in the opinion of the State Court, the Federal revenue statutes make express provision against such result.

Nor is taxation of a subject any recognition of its commercial character in the sense that it is withdrawn from the State's police power. If so, then taxation of "high explosives," "malodorous guanos," "putrid meats," would deprive the States

of the power to protect the people against their introduction. The power to tax is the power to destroy. It is often exercised, especially in levying license taxes, to restrict and even to destroy commerce, and even the manufacture of an objectionable commodity.

The legislation of Congress that will deprive the States of the right to legislate upon a subject under their reserved police powers must, it seems, have direct reference to the subject of commerce, and be utterly inconsistent with such power in the States.

Railroad vs. Haber, 169 U. S., 613.

Hence it has been held that the federal statute authorizing steam railway companies "to carry upon and over its road, boats etc., all passengers, mails, freight, etc., on their way from any State to another State, and to receive compensation therefor, and to connect with roads of other States, so as to form continuous lines for transportation of the same to the place of destination," is not conclusive.

Railroad vs. Haber, 169 U. S.
Railroad vs. Ohio, 173 U. S., 308.

No such recognition of commerce in cigarettes can be shown. Notwithstanding the above cited statute, this Court has repeatedly sustained State statutes vary materially affecting interstate transportation over railroads as proper exercise of police power. No just demand of interstate commerce requires the annulment of this Tennessee statute.

This case is distinguishable from that of *Leisy vs. Hardin*. Under the Iowa statute involved in the latter case, the State did not deny itself all

commerce in the article inhibited, but left the article, for some purposes, a legitimate article of commerce. It is left by that statute in the channels of commerce. In this case the article is inhibited altogether, not left in the channels of commerce for any purpose. It is declared to be not a legitimate article of commerce for any purpose whatever, but "bad, and bad only." The State denies itself the benefits of all commerce in the article. It is, therefore, not a statute to build up the commerce of the State at the expense of other States.

In *Leisy vs. Hardin* it is said that if proposed imports are "directly dangerous in themselves, the State may take appropriate measures to guard against injury before it obtains complete jurisdiction over them."

The Tennessee statute forbids not only the sale, but the offer to sell, and the giving away of cigarettes, and forbids also the *bringing* of them into the State for any of these purposes.

The inhibition of this statute takes effect at the border of the State, and "before it (the State) obtains complete jurisdiction over them."

It may be said that cigarettes are not "directly dangerous," but they are certainly equally harmful, and less useful, than many articles that are directly dangerous.

The question, however, is one as to the necessity of protection of the people against the particular article, and not as to the form of the evil.

Moreover, what was accomplished by the *Leisy-Hardin* case can be effected more beneficially to the whole people by the application of the principles contended for by defendant in error in this case. In that case the State legislation, in reference to a matter confessedly needing regulation,

was set aside, and the people left without any regulation on the subject until Congress chose to act.

Under the principle here contended for, the power of Congress to regulate is not denied, and the action of Congress, when taken, is conceded to be supreme and controlling, but until Congress does act, the people retain such benefits and protection as State legislation affords.

Does not the latter rule best subserve the ends of good government—the highest object of both the State and the United States?

II.

The sale in question was not of an original package, but of a part of an original package that had been broken by the importer or by his agent, after its introduction into the State.

The argument contained in the opinion of the State Court is relied upon in support of this proposition. A few suggestions in reply to the brief of plaintiff in error will be added.

This language is found in the brief of plaintiff in error, to-wit:

"It is the resident consignee whose act is questioned, and it is the package that he orders and receives from without the State that he has the right to sell. Of course, ordinarily, a delivery to the carrier, if it be a common carrier, is a delivery to the consignee, and so the criticism becomes, generally speaking, unimportant. In this case, however, it is important, for the Supreme Court of Tennessee holds that the agent of the carrier, in gathering up the packages from the warehouse of

the American Tobacco Company, and in putting these packages into a basket, which basket the carrier already had, was acting as *agent for the Tobacco Company.* If this be true, and if the carrier is to be thus considered the agent of the shipper, the American Tobacco Company, then the delivery to the plaintiff in error was not made until the agent of the carrier delivered these packages to plaintiff in error in Monroe County. Tennessee. Having then ordered these packages, with no basket whatever, and having received these packages, with no basket whatever, so far as the plaintiff in error is concerned, and he is the one indicted, each package is an original package, whatever method of shipment the American Tobacco Company may have adopted."

In reply it is submitted:

1. That if, as held by the State Court, the carrier was agent of the shipper, and, as inferred from that fact by plaintiff in error, that delivery to him did not take place until the baskets were emptied on his counter in Monroe County, Tennessee, then the shipper was the importer, and the sale to defendant by the shipper was consummated in Tennessee, and plaintiff in error could not resell as importer either in broken or unbroken packages.

2. That if the carrier, as plaintiff in error suggests, is to be treated as his agent to accept delivery and carry the cigarettes into this State, then plaintiff in error was the importer, and must sell the goods, "in his character as importer" and in "the form in which it (they) were imported."

Brown vs. Maryland, 12 Wheat, 446.
License Cases, 5. How., 574-576.

It is the package, in the "form and shape" in

which it entered the State, whether carried into the State by the agent of the seller or the agent of the buyer, that is in question. The carrier was agent of one or the other, and his acts, in making up the packages for shipment, and in breaking them, are, in law, the acts of his principal. If this be not true, and the carrier has so acted upon the packages without authority of seller or buyer that they were not the same when they were delivered to him and by him to the plaintiff in error as when they crossed the State line, then he must be treated as the importer. Some one must be importer, and he alone can sell as importer, and he can sell as importer only the original package in the form and shape in which it entered the State. It can never be tolerated that the parties shall evade the State laws by procuring or permitting some third person to make and break the original package which enters the State, and thereby escape responsibility themselves. Either they or the third person must be made amenable to law. It is not necessarily the package that the consignee "orders and receives" that is the original package. It must also be the package transported in the "shape and form" that it entered the State.

No matter by whom broken, the breaking of the original package destroys the right to sell its contents as an import.

In the license cases, Ch. J. Taney, in summarizing the decision in *Brown vs. Md.*, and declaring the law on this subject of interstate commerce, says: "And the Court there held that an article authorized by law of Congress to be imported continued to be a part of the foreign commerce of the country *while it remained in the hands of the im-*

porter for sale in the original bale, package, or vessel in which it was imported; that the authority given to import necessarily carried with it the right to sell the imported article *in the form and shape in which it was imported*, so that no State, either by direct assessment, or by requiring a license from the importer before he was permitted to sell, could impose any burden upon him or the property imported beyond what the law of Congress had itself imposed; *but that when the original package was broken up for use or for retail by the importer, and also when the commodity had passed from his hands into the hands of a purchaser, it ceased to be an import or a part of foreign commerce, and became subject to the laws of the State, and might be taxed for State purposes, and the sale regulated by the State like any other property.* * * * * * Indeed, goods imported, while they remain in the hands of the importer *in the form and shape in which they were brought into the country*, can in no just sense be regarded as a part of that mass of property in the State usually taxed for the support of the State government. * * * * * * And while they are in the hands of the importer for sale *in the form and shape in which they were introduced*, and in which they were intended to be sold, they may be regarded as merely *in transitu*, and on their way to the distant cities, villages and country for which they are destined, where they are expected to be used and consumed, and for the supply of which they were, in truth, imported." The authority of the license cases on this point has never been shaken.

In *Puryear vs. Mass., 5 Wall., 475-481*, will be

found Chief Justice Chase's views of what was decided in *Brown vs. Maryland.*

In the case of *Leisy vs. Hardin, 135 U. S., pp. 100-160,* Ch. J. Fuller states, as the result of the decision in *Brown vs. Maryland,* "that the point of time when the prohibition ceases and the power of the State to tax commences, is not the instant when the article enters the country, but when the importer has so acted upon it that it has become incorporated and mixed up with a mass of property in the country, which happens when the original package is no longer such in his hands."

See also, Bowman vs. R. R., 125 U. S., 524.
Waring vs. Mobile, 8 Wall, 110.

While the Court has not undertaken in any of these cases, or in others of which we are aware, to define an original package, its declarations seem to have been all to the effect that the package *in the form and shape* in which it is brought into the State is the original package of commerce which the importer is entitled to sell. This construction answers the purposes of commerce, and all the purposes of commerce, and at the same time does not trammel the necessary powers of the States.

Again, plaintiff in error contends that the adoption of an unusual method of shipment to evade State laws can have no force in the determination of this question.

It is said "the method of shipment was adopted, not to evade a law, but in order to get rid of technicalities."

What technicality stood in the way of plaintiff in error except a plain State statute? The contention here seems to be that the commercial clause of the Constitution shelters not only the ordinary,

direct and honest transaction of commerce—commerce carried forward by the usual methods—but any unusual and colorable device or form that may be invented by an importer to evade and defeat a State law, as a technicality.

The right of the States to protect their people by appropriate legislation is quite as important and sacred as the right of an importer to sell his import.

State laws have sometimes been declared mere colorable and fraudulent devices to evade the Constitution and have been set aside for the protection of importer's rights.

Will not the colorable and fraudulent devices of importers, invented to evade State laws and subvert the rights and powers of the States, be treated in like manner? Fraudulent and indirect schemes to evade State laws have never met with favor in this Court.

In *Mitchell vs. Leavenworth County, 1 Otto, 206*, a taxpayer sought to enjoin an assessment on the ground that his funds consisted of exempt United States notes.

The facts were that on the day of assessment Mitchell had only these exempt notes. It further appeared, however, that he ordinarily carried a large bank account, but shortly before assessment he drew it out in these notes to evade taxes. This Court refused relief, saying it would not "knowingly use its extraordinary powers to promote any such scheme as this plaintiff devised to escape his proportionate share of the burdens of taxation. His remedy, if he has any, is in a Court of law." True, that was an appeal for the exercise of the extraordinary powers of this Court as a Court of equity. What power of this Court is more ex-

traordinary, or more reluctantly exercised, than the power invoked in this case, the power to declare a statute unconstitutional and void. Such power is never exercised unless the question necessarily arises upon the record.

No statute is ever declared unconstitutional unless it appear so beyond reasonable doubt. The burden is upon the party assailing the constitutionality of a statute to establish every requisite to the exercise of the jurisdiction by the Court.

But, as we have already seen, this cunning device by which the carrier is made to do the packing and unpacking for the parties, and thereby enable the seller to say that he did not pack the goods, and the buyer to say he did not unpack them, is unavailing.

No matter who brings the goods into the State, they must be sold, if at all, in the *shape* and *form* in which they entered.

A beneficial State law will not be stricken down, and the power denied the State to protect its citizens, upon any such fine-spun theories as is advanced by plaintiff in error in the following quotation from his brief, to-wit:

"The methods and means used by the Express Company in getting the packages of cigarettes from Durham, North Carolina, to Madisonville, Tennessee, cannot affect the question as to whether these packages were or were not original packages. The basket used by the Express Company was in its possession before it received these packages at all. Presumably it was the property of the Express Company, since presumptive title as to personalty follows the possession. When the Express Company received from the shippers these packages of cigarettes to carry to Madisonville, Ten-

nessee, it had to deposit them somewhere, either in its car, or box in its car, or basket, or in some way. It chose a basket, but it never delivered that basket to the consignee, and it never received it from the shipper. The basket was its own receptacle as thoroughly as the express car would have been."

In other words, it is not only possible, but easy of accomplishment, for the importer, whether seller or buyer, to shelter himself under the commerce clause of the Constitution, and evade all State police regulations by simply having the carrier or other third person to pack and unpack his goods.

It is a sufficient answer to the contention that the plaintiff in error sold an original package as declared by the revenue laws and department, and that such revenue package is likewise the original package of commerce, to say that these cigarettes were not introduced in the revenue packages, but in combinations of these packages into a larger one, and that the latter constitutes, in such case, the original package of commerce. It was one of the parts of an original package that was sold by plaintiff in error. The identity of the original package had been destroyed by breaking it. It was the basket in this case.

The case of *State vs. Goetze, 43 W. Va., 495*, held that an inclosed box containing small ten cigarette packages did not constitute the original package of commerce, but that each component small package was an original package and could be sold as such after breaking the box.

This case is clearly out of line with the great weight of authority. No other case goes so far. There are numerous cases to the contrary.

The suggestion, rather than insistence, that this Court has "intimated that something other must be done to clearly identified and self identifiable imports besides breaking the package in which shipped before they can be said to have become commingled and mixed with the mass of property in the State, is novel and without the support of reason or authority.

The language cited from *Leisey vs. Hardin* and other cases was not intended to decide any such proposition. The cases, from which the citations are taken, are cases in which there was no controversy as to the fact of original package.

Moreover, a fuller and more accurate statement of the rule will be found in other portions of the opinions, especially in *Leisey vs. Hardin.*

The proposition put forward in the brief of plaintiff in error, that the package he sold in this case is an original package, and, as such, an import, and that *it would have retained its character as an import even if it had been enclosed with other packages of like kind, for convenience of shipment, and he had broken the inclosure and taken one of the packages out,*" finds no support in the *decision* of any Court except that of West Va., in the *Goetze* case. There is an overwhelming weight of reason and authority to the contrary.

McGregor vs. Cone, 39 L. R. A., 484, citing the cases.

Nor is it necessary that the "box, barrel, crate or other receptacle" in which goods are imported, shall be fastened or inclosed to constitute it, and not the smaller packages constituting its contents, the original package of commerce.

South Dakota vs. Chapman, 10 L. R. A., 432.
Keith vs. Ala., 10 L. R. A., 430.

In conclusion:

"The judiciary of the United States should not strike down a legislative enactment of a State—especially if it has direct connection with the social order, the health, and the morals of the people—unless such legislation *plainly* and *palpably* violates some right granted or secured by the National Constitution, or encroaches upon the authority delegated to the United States for the attainment of objects of National concern."

Plumley vs. Mass., 155 U. S., 461.

G. W. PICKLE,
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